Supreme Court, U.S.
FILED

(1) 96 854 NOV 27 1996

No.

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

MASTER SERGEANT JOSE M.C.R. URETA,
PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

Petition For a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

PETITION FOR WRIT OF CERTIORARI

Marge A. Overly
Captain, United States Air Force
Appellate Defense Division
Counsel of Record

Air Force Legal Services Agency
Appellate Defense Division
172 Luke Avenue, Suite 343
Bolling AFB, DC 20332-8000
202-767-1562

November 1996

75 pp

QUESTION PRESENTED

Whether the United States Court of Appeals for the Armed Forces erred when it held that the admission of hearsay statements of the petitioner's sole accuser did not violate the petitioner's Sixth Amendment right to confront his accuser as explained in *Idaho v Wright*.

TABLE OF CONTENTS

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

REASON FOR GRANTING THE WRIT 3

CONCLUSION 9

APPENDIX A (Opinion of the United States Court of Appeals for the Armed Forces) 1a

APPENDIX B (Opinion of the United States Air Force Court of Criminal Appeals) 27a

TABLE OF AUTHORITIES

Supreme Court Cases:

Idaho v. Wright, 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990) 3, 7, 8, 9

Military Cases:

United States v. Avila, 27 M.J. 62 (C.M.A. 1988) 5

United States v. Deland, 22 M.J. 70 (C.M.A. 1986). . . . 4

United States v. Edens, 31 M.J. 267 (C.M.A. 1990). . . . 5

United States v. Hines, 23 M.J. 125 (C.M.A. 1986). . . . 7

United States v. Moreno, 36 M.J. 107 (C.M.A. 1992) . . 8

United States v. Quigley, 35 M.J. 345 (C.M.A. 1992). 5, 9

United States v. White, 25 M.J. 50 (C.M.A. 1987). 5

United States v. Williamson, 26 M.J. 115 (C.M.A. 1988). 4, 5

United States v. Moreno, 31 M.J. 935 (A.C.M.R. 1990). 7, 8

United States v. Pollard, 34 M.J. 1008 (A.C.M.R. 1992). 8

United States v. Siroky, _ M.J. _ (C.M.A. 1996). 5

Federal Statutes:

28 U.S.C.A. § 1259(3) (West Supp. 1996) 2

10 U.S.C.A. § 867 (a) (West Supp. 1996) 2

Constitutional Provisions:

U.S. Constitution Amendment VI. 2, 7, 9

Manual for Courts-Martial, United States, 1984:

Mil.R.Evid. 201 6

Mil.R.Evid. 802 4

Mil.R.Evid. 803 4

Mil.R.Evid. 803(4) 2, 4, 5, 6

Mil.R.Evid. 804(b)(5) 2, 4, 6

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

No.

MASTER SERGEANT JOSE M.C.R. URETA,
PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

Petition For a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

---

PETITION FOR WRIT OF CERTIORARI

The petitioner, Master Sergeant Jose M.C.R. Ureta, respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Armed Forces entered in his case on 29 August 1996.

OPINIONS BELOW

The order and judgment of the United States Court of Appeals for the Armed Forces, reported at 44 M.J. 290 (29

August 1996), is located at Appendix A. The opinion of the United States Air Force Court of Criminal Appeals as reported at 41 M.J. 571 (AF Ct. Crim App 1994), is located at Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Armed Forces was entered on 29 August 1996. The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1259 (3) (West Supp. 1996) and 10 U.S.C.A. § 867(a) (West Supp. 1996).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment of the Constitution of the United States provides in relevant part: In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . .

STATEMENT OF THE CASE

At the petitioner's general court-martial on charges of rape, indecent acts, and attempted sodomy, the military judge admitted into evidence, over objection, a videotaped statement of the victim to the AFOSI under the residual hearsay exception of Military Rule of Evidence [hereinafter Mil.R.Evid.] 804(b)(5) and admitted into evidence statements made by the victim to Dr. Boos, a pediatrician, under Mil.R.Evid. 803(4) as a statement made for the purpose of medical treatment. The parties agreed that the victim was unavailable as a witness. The military judge concluded that the petitioner's Sixth Amendment right to confront and cross–examine his accuser was not unfairly infringed upon by allowing previous statements of the declarant into evidence

because the defense could subpoena the declarant to explain why she recanted her earlier statements. (R–227–229, App. Ex. XLI).

On appeal to the Air Force Court of Criminal Appeals, the Air Force Court held that the military judge did not abuse his discretion in admitting the victim's statements to Dr. Boos since the record supports a finding that the victim made the statements in anticipation of receiving medical treatment. *United States v. Ureta,* 41 M.J. 571, 577 (A.F. Ct. Crim App 1994). Similarly, the Air Force Court held that the military judge did not err in admitting the videotaped interview since a finding could properly be made that it met the circumstantial guarantees of trustworthiness required for admission under the residual hearsay exception. *Id.* at 578. On appeal to the Court of Appeals to the Armed Forces, that Court agreed, finding that the military judge did not abuse his discretion in admitting either the videotaped interview or the statements to Dr. Boos. This opinion is contrary to the petitioner's Sixth Amendment right to confront his accuser es explained in *Idaho v. Wright,* 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990).

REASON FOR GRANTING THE WRIT

THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES ERRED BY FINDING, CONTRARY TO *IDAHO v. WRIGHT,* THAT THE HEARSAY STATEMENTS OF THE ACCUSER WERE NOT ERRONEOUSLY ADMITTED AGAINST THE PETITIONER.

The government's primary evidence against the petitioner consisted of the videotaped interview with the victim, petitioner's daughter, and her hearsay statements to Dr. Boos. The defense submitted a motion *in limine* (R–9,

App. Ex. I) to exclude certain hearsay statements. The defense asserted that the statements made to Dr. Boos were not made for the purpose of medical treatment or diagnosis, and therefore, did not meet the requirements of the medical treatment exception to hearsay under Mil.R.Evid. 803(4). The defense further asserted that the videotaped interview of the victim should not have been admitted as residual hearsay under Mil.R.Evid. 804(b)(5). (R-App. Ex. XII).

On 18 March 1992, the victim, after telling her friend that her father had been "messing" with her, was taken to the Office of Special Investigations (AFOSI). Special Agent (SA) David Dick interviewed the victim for approximately 30 minutes during which time he asked if she would consent to an examination because medical evidence had to be gathered in these types of allegations. He then notified the hospital that he was bringing a suspected child abuse victim in for an examination. The victim, thus, did not have and could not have had any expectation of receiving medical treatment from the hospital.

Military Rule of Evidence 802 states that "[h]earsay is not admissible except as provided by these rules ..." Military Rule of Evidence 803 lists some exceptions which allow hearsay to be admitted. Among these exceptions is Mil.R.Evid. 803(4), statements made for the purposes of medical diagnosis or treatment. Such statements must be "made for the purposes of medical diagnosis and treatment" and must be made by a patient who has "some expectation of receiving medical benefit from the medical diagnosis or treatment that is being sought." *United States v. Williamson,* 26 M.J. 115, 118 (C.M.A. 1988); *United States v. Deland,* 22 M.J. 70, 75 (C.M.A. 1986). Additionally, in child sexual abuse cases, "[i]t must be shown that the child is aware that he or she is being treated for sexual abuse, otherwise the entire premise of the reliability of the statement dissipates." *United*

States v. Siroky, No. 95–5004, _ M.J. _ (1996); *United States v. Edens,* 31 M.J. 267, 269 (C.M.A. 1990). " [U]nless it appears that the child knows at least that the person is rendering care and needs the information in order to help, the rationale for the exception disappears entirely. . . ." (citations omitted) Without such a showing—however reliable the statements might appear to be—some basis other than the "statements for purposes of medical diagnosis or treatment" must be found if they are to be admitted." *United States v. Avila,* 27 M.J. 62, 66 (C.M.A. 1988).

The government presented testimony of Dr. Boos, who testified he was a pediatrician at the pediatric clinic, United States Air Force Hospital, Wiesbaden, Germany. He had been informed that a child sexual abuse case was being brought to the Emergency Room. He discussed the case first with the AFOSI agents in the back room, where they briefed him on what they had heard. (R–143). He told the putative victim that he needed to hear her story. (R--144).

To qualify for admission as an exception to the hearsay rule, Dr. Boos' testimony must meet the foundational facts required by Mil.R.Evid. 803(4). The foundational facts are that a statement: (1) was made (2) near the pivotal time of the events (3) to an individual who could render medical diagnosis or treatment (4) by an individual who had an expectation of receiving treatment from the recipient of the statement and (5) refers to the person's mental or emotional condition. *United States v. Quigley,* 35 M.J. 345 (C.M.A. 1992). In reviewing these criteria, there is substantial doubt these foundational facts were met.

The government presented no evidence that the victim's statement to Dr. Boos was made as part of her treatment or desire to be cured. *See, United States v. White,* 25 M.J. 50 (C.M.A. 1987); and *United States v. Williamson, supra.* The premise of the rule is that a patient seeking treatment or

diagnosis is more apt to be truthful because he/she believes that by telling the truth such treatment will be forthcoming, thus the declarant benefits from making a truthful statement. The victim was told by SA Dick that as part of the investigation she was required to undergo a medical examination, as it was necessary to obtain medical evidence. (R–70) The victim was telling her story to Dr. Boos not to get some medical benefit, but because the AFOSI agent told her it was part of the investigation and the evidence was required in these types of cases.

Prior to the examination by Dr. Boos, Dr. Boos was briefed by the AFOSI agents. (R–49) Dr. Boos' notes of the interview of the victim were fairly detailed as to exactly what she told him. His motivation for making these notes as exact as possible was because he felt he may be called to testify in court. (R–52). The victim had no expectation of medical treatment, did not ask for medical treatment and was largely passive during the treatment. Therefore, the court below erred by finding the statements made by the victim to Dr. Boos could be admitted under Mil.R.Evid. 803(4).

Over objection of the defense, the videotaped interview of the victim was admitted as an exception to the hearsay rule under Mil.R.Evid. 804(b)(5). (R–App. Ex. XLI) The military judge found that the victim was unavailable to testify and could not be forced to appear and testify against her father under German law. As there is no judicial notice of the German law under Mil.R.Evid. 201, it appears the military judge has made sweeping conclusions of what the German law provides.

The military judge in his "Findings of Fact" (R–App. Ex. XLI) stated: "The accused's 6th Amendment right to confront and cross–examine his accuser was not unfairly infringed upon by allowing previous statements of the declarant into evidence, since the defense can subpoena the declarant to

explain why she recanted her earlier statements." Petitioner was not responsible for the witness refusing to testify and had no control over the witness. Neither petitioner nor his counsel had the opportunity to cross–examine or even question the witness. The trial defense counsel contacted the witness' attorney in writing (R–227) and the government sent a subpoena; the witness refused to testify.

After trial, the military judge, in his "Findings of Fact" (R–App. Ex. XLI, paragraph 7), stated:

> The videotape interview has ample guarantees of trustworthiness. The declarant's statement was obtained without leading questions and is in her own words. It is the freely conceived product of the declarant as opposed to the result of suggestive interrogation. The statement is voluntary, is under oath, is detailed, is factual as opposed to conjectural, and is based on first–hand knowledge of the events. The declarant was relatively mature and aware of the need to be truthful, she lacked a motive to falsify at the time, she was a member of the accused's household and depended upon him for support, and subjected herself to ridicule and social stigma among her friends and family by making the statement. . . .

These were the same bases used by the military judge in *United States v. Moreno,* 31 M.J. 935 (A.C.M.R. 1990). However, as The Court of Military Review in *Moreno* correctly points out (at 939), that aspect of the *Hines* [*United States v. Hines,* 23 M.J. 125 (C.M.A. 1986)] line of cases was effectively overruled by *Idaho v. Wright,* 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990)

The Sixth Amendment to the United States Constitution provides, in part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses

against him." *See, United States v. Moreno, supra, and United States v. Moreno,* 36 M.J. 107 (C.M.A. 1992), *United States v. Pollard,* 34 M.J. 1008 (A.C.M.R. 1992). The United States Supreme Court decision in *Idaho v. Wright, supra,* is now the controlling case on this issue. In *Wright,* the Court held that, in judging whether a statement shows "an indicia of reliability," either the statement must fall within a firmly rooted hearsay exception or be supported by a showing of "particularized guarantees of trustworthiness." The particularized guarantees of trustworthiness are limited to the "totality of the circumstances surrounding the making of the statement and that renders the declarant particularly worthy of belief" and not from any subsequent corroboration of the criminal act using other evidence. "Evidence possessing 'particularized guarantees of trustworthiness' must be at least as reliable as evidence under a firmly rooted hearsay exception. [Citation omitted.] Unless an affirmative reason, arising from the circumstances in which the statement was made, provides a basis for rebutting the presumption that a hearsay statement is not worthy of reliance at trial, the Confrontation Clause requires exclusion of the out–of–court statement." *Moreno,* (A.C.M.R.), *supra.*

Some of the factors to be considered in determining whether a statement is reliable are: spontaneity and consistent repetition of the statement, the mental state of the declarant, use of terminology unexpected of a child of similar age, and lack of motive to fabricate. In this case the declarant's statement was not spontaneous, as she had been questioned previously by the AFOSI Agent, Mrs. Holman and Dr. Boos; the facts were neither consistent nor repetitious, the terminology was not unexpected of a child of similar age (Dr. Boos had used the same terminology), and she did have a motive to fabricate, as evidenced in her own statement which she recanted at a later date. The Court of Appeals, in

determining that there were sufficient guarantees of trustworthiness, considered the statements made by the victim to her friend and to Dr. Boos, reasoning that these were part of a compressed sequence of events and so were part of the circumstances surrounding the making of the statement. This is contrary to the rule of law in *Idaho v. Wright.* The two prior statements (to the friend and to Dr. Boos) were separate and distinct from the videotaped interview. They were not part of the circumstances surrounding the making of this statement and, therefore, should not be used to uphold its admission.

CONCLUSION

Unlike the case of *United States v. Quigley, supra,* where there was other evidence a crime had been committed, in this case there is no remaining evidence that would support the finding that a crime had been committed or that would support a finding of guilty. The military judge obviously misapplied the law by admitting the videotape and the out of court statements made to Dr. Boos. The Court of Appeals for the Armed Forces erred by upholding the admission of this hearsay in violation of the petitioner's Sixth Amendment right to confront his accuser.

MARGE A. OVERLY
Captain, United States Air Force
Appellate Defense Division
Counsel of Record

Air Force Legal Services Agency
Appellate Defense Division
172 Luke Avenue, Suite 343
Bolling AFB, DC 20332–8000
202–767–1562

November 1996

APPENDIX A

UNITED STATES, Appellee

v.

Jose M.C.R. URETA, Master Sergeant
U.S. Air Force, Appellant.

No. 95–0321.
Crim. App. No. 30274.

U.S. Court of Appeals for
the Armed Forces.

Argued Dec. 7, 1995.
Decided Aug. 29, 1996.

Accused was convicted by general court–martial, Wade B. Morrison, J., of one specification of rape and one specification of carnal knowledge. The United States Air Force Court of Criminal Appeals, Becker, J., 41 M.J. 571, affirmed. Accused appealed. The United States Court of Appeals for the Armed Forces, Gierke, J., held that: (1) victim's taped interview with special agent of Air Force Office of Special Investigations (OSI) had circumstantial guarantees of trustworthiness sufficient to be admissible under residual hearsay exception; (2) military judge properly considered extrinsic corroboration in assessing reliability of taped interview with special agent of Air Force OSI; (3) ample evidence supported military judge's finding that alleged sexual abuse victim's statements to pediatrician were admissible under medical exception to hearsay rule; (4) prosecution was properly allowed to question alleged victim's mother based on their belief that she would provide evidence that accused had admitted sexually abusing his daughter; (5)

testimony of victim's mother given during pretrial investigation hearing, although inadmissible for impeachment purposes since witness was available, was admissible as substantive evidence of prior inconsistent statement; and (6) although military judge erred by permitting court members to take pretrial investigation hearing transcript into their deliberations, this error was harmless.

Affirmed.

Everett, Senior Judge, filed dissenting opinion in which Sullivan, J., joined.

1. Military Justice ⊂= 1095

Alleged sexual abuse victim's taped interview with special agent of Air Force Office of Special Investigations (OSI) had circumstantial guarantees of trustworthiness sufficient to be admissible under residual hearsay exception in general court–martial for rape and carnal knowledge; even though interviews took place in OSI offices, police station atmosphere was attenuated by presence of victim's best friend in whom victim had first confided, questions were not suggestive, interview took place only two days after last incident of alleged abuse and victim was making herself homeless by accusing her father. Military Rules of Evid., Rule 804(b)(5).

2. Military Justice ⊂= 1095

Statements elicited by law enforcement officials are regarded with caution but are not per se inadmissible under residual exception to hearsay rule. Military Rules of Evid., Rule 804(b)(5).

3. Military Justice ⊂= 1420

Military judge's decision to admit residual hearsay is

entitled to considerable discretion on appellate review. Military Rules of Evid., Rule 804(b)(5).

4. Military Justice ⊶ 1095

Military judge properly considered extrinsic corroboration, the victim's previous statements to her best friend and to physician, in assessing reliability of taped interview with special agent of Air Force Office of Special Investigations (OSI) under residual hearsay exception; given compressed sequence of events, victim's consistent statements to two others immediately before interview were part of circumstances surrounding making of statement. Military Rules of Evid., Rule 804(b)(5).

5. Military Justice ⊶ 1091

Ample evidence supported military judge's finding that alleged sexual abuse victim's statements to pediatrician were made for purposes of medical diagnosis and that patient provided information expecting treatment and, thus, were admissible under medical exception to hearsay rule; evidence shows that 13–year old was old enough and intelligent enough to understand what was happening and physician identified himself as pediatrician, questioned victim in a hospital setting, performed physical examination, conducted laboratory tests for pregnancy and sexually transmitted disease, and explained to victim why he needed information. Military Rules of Evid., Rule 803(4).

6. Military Justice ⊶ 1422

Military judge's finding that declarant had actual expectation of receiving medical treatment is preliminary finding of fact and will not be overturned on appeal unless it is clearly erroneous.

7. Military Justice ⚷ 1141, 1143.1

Prosecution was properly allowed to question alleged sexual abuse victim's mother based on their belief that she would provide evidence that accused had admitted sexually abusing his daughter and, thus, testimony was not for sole purpose of impeaching witness; although mother recanted her previous testimony against her husband, prosecution did not know beforehand what she would say as mother had refused to speak with prosecution.

8. Military Justice ⚷ 1150

Testimony of alleged sexual abuse victim's mother, given during pretrial investigation hearing, although inadmissible for impeachment purposes since witness was available, was admissible as substantive evidence of prior inconsistent statement where prosecution called mother to lay foundation for admission of testimony from hearing. Military Rules of Evid., Rules 613(b), 801(d)(1).

9. Military Justice ⚷ 1270.1, 1426

Although military judge erred by permitting court members to take pretrial investigation hearing transcript into their deliberations in general court-martial for rape and carnal knowledge, this error was harmless where transcript was not only evidence against accused, transcript was only relevant to whether accused admitted to his wife that he had sexually abused his daughter, and other evidence of guilt included taped statement of his daughter, testimony by pediatrician and testimony by social worker.

For Appellant: *David R. Dowell* (argued); *Colonel Jay L. Cohen* and *Captain Marge A. Overly* (on brief).

For Appellee: *Captain R. Scott Howard* (argued); *Colonel Jeffery T. Infelise* (on brief); *Colonel Thomas E. Schlegel.*

Opinion of the Court

GIERKE, Judge:

A general court–martial composed of officer members at Rhein–Main Air Base, Germany, convicted appellant, contrary to his pleas, of rape, carnal knowledge, and committing an indecent act upon a female under the age of 16, in violation of Articles 120 and 134, Uniform Code of Military Justice, 10 USC §§ 920 and 934, respectively. The approved sentence provided for a bad–conduct discharge, confinement for 10 years, and reduction to the lowest enlisted grade. The Court of Criminal Appeals set aside the conviction of carnal knowledge, reassessed the sentence, and affirmed only so much of the sentence as provided for a bad–conduct discharge, confinement for 7 years, and reduction to the lowest enlisted grade. 41 MJ 571, 581 (1994).

We granted review of the following issues:

I

WHETHER THE MILITARY JUDGE ERRED TO APPELLANT'S PREJUDICE BY ADMITTING THE VIDEOTAPED INTERVIEW OF [K] TAKEN BY SPECIAL AGENT DAVID DICK.

II (Modified)

WHETHER THE MILITARY JUDGE ERRED TO APPELLANT'S SUBSTANTIAL PREJUDICE BY ADMITTING THE TESTIMONY OF DR. STEPHEN BOOS.

III

WHETHER IT WAS IMPROPER TO ALLOW THE PROSECUTOR TO CALL A WITNESS SOLELY TO IMPEACH HIM/HER.

IV

WHETHER IT WAS IMPROPER TO ALLOW EXTRINSIC EVIDENCE OF TESTIMONY OF MRS. CHRISTINA M. URETA AT THE ARTICLE 32(b) INVESTIGATION UNDER THE GUISE OF IMPEACHING MRS. URETA.

We resolve all four issues against appellant.

Factual Background

JH, a friend and schoolmate of appellant's 13–year–old daughter, K, testified that on the afternoon of March 17, 1992, K told her that appellant "had been messing with her" since she was 9. JH testified that K did not want to go home and that she wanted the "messing" to stop. JH asked K "if she wanted to talk to" JH's mother, Mrs. H, and K accepted.

On the morning of March 18, Special Agent (SA) David Dick of the Air Force Office of Special Investigations (OSI) interviewed K for about 30 minutes. Based on K's complaint that her father was sexually molesting her, the OSI agents took K, accompanied by Mrs. H, to an Air Force Medical Center in Wiesbaden, Germany. At the medical center a pediatrician, Major (Maj) Stephen Boos, MD, examined K. Maj Boos had been notified that "a suspected child sexual abuse" case was being brought to the emergency room. When K arrived, the OSI agents told Maj Boos what K had told them: that K "had been sexually abused but that sexual abuse had involved intercourse but not anal penetration or oral sex."

Maj Boos asked K whether she wanted Mrs. H present, and K responded in the affirmative. Maj Boos "told them who I was, Dr. Boos, that I was a pediatrician, let them know that I had heard a little bit of [K's] story and that I wanted to talk to her and to examine her to see whether any harm had come to her, whether she had caught any infections; but that before I started, to do the best job I needed to hear her story from herself."

Maj Boos explained his purpose as follows:

> Well, we always screen for sexually transmitted diseases and pregnancy, but our index of suspicion is changed by the events as they occurred. I'm also trying to evaluate to a certain degree whether I feel the patient is telling a credible statement, whether they have the details and experiences, relate the experiences that I would expect from this kind of patient so that I can know whether it's a likely statement or an unlikely statement. And I want to know what kind of psychological state they're in, whether they've been in a lot of involvement with a person who's very close to them over a long period of time, which is likely to be more difficult for them, or whether it was a simple single involvement with someone who they're not really too close to, which is less psychologically traumatic. And I try to make some of these determinations to discuss with the other members of the team.

Maj Boos was asked, "What is the overall purpose of this?" He responded, "It's to provide medical treatment, including psychological treatment."

Maj Boos testified that he was aware of "the medical exception to the hearsay rule" and that when there is a possibility of having to testify, he tries "to get as much of what the person that you're treating says" into the medical

records. Maj Boos testified further, however, that most of what he wrote in his notes "is necessary knowledge for her therapist, for treating her."

Maj Boos testified that he examined K and found "some vaginal changes that were consistent with having been penetrated" and symptoms of a potential sexually–transmitted disease. Asked about his plan of treatment, Maj Boos testified:

> I screened her for sexually transmitted diseases and pregnancy. I recommended that she see a gynecologist. I recommended that visit be delayed until after she had had her tests back so that if there were other things to be treated it could be done in one visit and spare her the additional visit but when all the tests were negative I wished her to be seen by a gynecologist where he could verify and evaluate further that papule in her vagina. I felt that she needed to be engaged early in a plan of treatment, psychological treatment, for her what I felt was a full sexual abuse accommodation syndrome at the hands of her father who is a very close person to her and therefore has a greater potential for doing psychological harm and having long–term impact. I recommended that to her counselor and then I recommended that she be placed in foster care because I didn't think the home was a good place for her to return to at that point.

The defense objected to Maj Boos'testimony on the ground that his questioning of K was for criminal investigative purposes rather than medical diagnosis and treatment. *See* Mil.R.Evid. 803(4), Manual for Courts–Martial, United States (1995 ed.). The military judge overruled the objection. Before the members, Maj Boos testified that K told him that appellant had begun touching her when she was 9 years old. Maj Boos asked K, "Normal people

touch each other and normal fathers touch normal girls; was it like that?" K responded, "No, it wasn't, because he had touched her breasts and her butt." Maj Boos testified further:

> I asked her if she had told anyone, and she said that she hadn't told anyone. And then later on I asked her when it had changed, since I'd already heard some other stories, and she said, around 10 or 11 it had changed. I said, what was different? And I can't quote her but she said she had begun having sexual intercourse. At first she couldn't recall that word and she looked to Mrs. [H], but before Mrs. [H] could answer she recalled the words, "sexual intercourse." And then, because that's a school word, a word adults use in talking with children sometimes, I asked her, you know, if her dad had taken his penis out, and she said, yes. And I asked her if he had touched her with it, and she said, yes. I said, "Where?" And she said, "Inside my butt." And then I asked her if she could explain "inside my butt" a little bit more, and she couldn't explain it any further than that.

Maj Boos testified that K told him that sexual intercourse with appellant had begun when she was between 10 and 11 years old. He asked her when the last time was, and K told him it was "the Sunday before." Maj Boos testified further:

> She said her father had come back from Africa and that at night when she was in bed he had come into her room and come to her bed and put his hands in her pants and begun messing with her, in her words, and then they did it. I said, "Did what?" and she said they had sex. And then I asked her some questions about, did anything come out of his penis? And she said yes, sperm. Again, sperm was kind of a schoolbook word and so I asked her how

> did she know about sperm? She said that she learned about sperm in school. Then I asked her if anything came out of her and she said, "Sperm," so I said, "What was it like?" And she made kind of a distasteful face and said it was gross and slimy.

Maj Boos testified that his physical examination revealed that K had a "papule" or "bump" in her vagina, which he thought might be a papilloma, which is a sexually transmitted virus infection. He noted a notch in her hymen, "a finding that's not found in normal 13–year–old girls." He said that the significance of the notching is "a subsequent penetration of some sort."

After Maj Boos' medical examination was completed, the OSI transported K and Mrs. H back to the OSI office, where they conducted a videotaped interview of K. SA Dick testified that it was "standard" in sexual abuse cases to videotape the interview. He explained why:

> Well, for one, the videotape can be shown to prosecution and defense attorneys so that the victim is not, in essence, questioned over and over; and for another, because in child sexual abuse allegations it seems that the children always recant statements prior to trial.

K's "best friend" (JH) and JH's mother were present during the videotaped interview at K's request. During the interview, K said that appellant "has been . . . messing with me ever since I was 9." K told SA Dick that appellant "touches my breasts and private parts." She said the touching happened 4–5 times a week. She told SA Dick that appellant began having "sexual intercourse" with her when she was 11. She said that appellant "tried to put his private into my mouth," but she pushed him away. She said that the last instance of fondling and sexual intercourse was 2 days before the interview.

After the videotaped interview with the OSI, K returned to the pediatric ward in Wiesbaden. She was interviewed there by Captain Carl Rohbock, a Family Advocacy Officer and Mental Health Officer.

Capt Rohbock was not called as a prosecution witness, but was requested by the court members after both sides had rested. A defense objection that Capt Rohbock's testimony did not qualify under Mil.R.Evid. 803(4) was overruled. Admissibility of Capt Rohbock's testimony is not before this Court.

Capt Rohbock had three visits with K in the hospital and six more in the Mental Health Clinic. He testified that on March 18, 1992, at his first meeting with her, K told him "that her father had started at the age of 9 . . . manipulating her vaginal area with his fingers, sleeping with her, rubbing her, touching her; and that by age 11 that had progressed to full intercourse where he was penetrating and having intercourse with her." At their third meeting in the hospital, K repeated her allegations. In spite of her allegations against her father, K told Capt Rohbock that she preferred to live with her father instead of her mother. Capt Rohbock explained that K "had made some allegations of physical abuse by the mother toward the two boys; that her mother was very controlling, demanding; and that she didn't like her mother. Specifically, she hated her mother."

During subsequent meetings, K was very angry and "upset" with her mother "[b]ecause her mother knew that she was being sexually abused and was not acting to protect her." On May 19, 1992, Capt Rohbock noted that K "began to be noncooperative . . . . [n]ot wanting to talk; not wanting to come to meetings; not wanting to participate in therapy or sessions with her mother. . . ." Capt Rohbock testified that K told him that she had talked with her aunt, who told her "[t]hat if she would change her story that her father would be

able to get treatment; that sexual abuse would no longer be continuing; that [K] could come and live with her; and that her father could get treatment and wouldn't have to go to prison." K told Capt Rohbock that her aunt's suggestion was "repulsive."

On March 23, 1992, appellant's wife, Christina Ureta, made a sworn statement to SA Dick. Mrs. Ureta is K's mother. Mrs. Ureta told SA Dick that on March 18, after the OSI agents had left their home, appellant admitted sexually abusing K. In her statement, Mrs. Ureta also said that appellant admitted placing his fingers in K's vagina but denied having sexual intercourse with K. (Prosecution Exhibit 2 for Identification)

On June 15, a lawyer representing K informed military authorities that K would invoke her privilege under German law and refuse to testify regarding the charges against her father. Attached to the lawyer's letter was a statement from K recanting her accusations against appellant. (Defense Exhibit A) At trial, counsel for both sides agreed that K could not be compelled to testify and was therefore unavailable.

Mrs. Ureta testified at the investigation under Article 32, UCMJ, 10 USC § 832, on June 16, 1992. She repeated what she told SA Dick—that appellant admitted placing his fingers in K's vagina. (Pros. Ex. 3 at 3) She testified that this admission was on March 18, the day K was interviewed by the OSI and Maj Boos. She also testified that on April 4, she confronted appellant with K's accusations and appellant admitted having sexual intercourse with K. (Pros. Ex. 3 at 4) Finally, she testified that appellant tried "[a]t least four times" to persuade her to change her testimony. (Pros. Ex. 3 at 17)

At trial the military judge overruled defense motions in limine and admitted the OSI interview videotape. (Pros. Ex. 1) The military judge made findings to support his ruling admitting the videotape, as follows:

> The videotape interview has ample guarantees of trustworthiness. The declarant's statement was obtained without leading questions and is in her own words. It is the freely conceived product of the declarant as opposed to the result of suggestive interrogation. The statement is voluntary, is under oath, is detailed, is factual as opposed to conjectural, and is based on first–hand knowledge of the events. The declarant was relatively mature and aware of the need to be truthful; she lacked a motive to falsify at the time, she was a member of the accused's household and depended upon him for support, and she subjected herself to ridicule and social stigma among her friends and family by making the statement. The statement was made by the declarant shortly after the incident to which the statement relates with little opportunity to reflect, and is similar to other "firmly rooted hearsay exceptions," i.e., it is a restatement of allegations made earlier that same day to Dr. Boos in a very reliable setting that qualifies under MRE 803(4), and is also a restatement of allegations made the day before to [JH] in a reliable setting that nearly qualifies under MRE 803(2).

Mrs. Ureta was called by the prosecution on the merits but was something of a "wild card" witness. During the initial Article 39(a), UCMJ, 10 USC § 839(a), session, trial counsel informed the military judge, "I don't know what, if any, testimony she will provide." Later, when the military judge asked trial counsel if Mrs. Ureta would be testifying, trial counsel responded:

> Sir, she is here; but whether or not she's actually going to testify and give us any information, I don't know. Like I said, when I realized she was here I

asked her if she was going to testify and she said, "I won't answer you. I haven't decided yet."

When Mrs. Ureta was called as a prosecution witness, she declared, "I do not wish to answer any questions and testify against my husband." The military judge informed her that she "must answer or suffer any consequences for refusing to testify." She was then asked: "[W]hat admissions did your husband make to you concerning any child sexual abuse he might have done against your daughter?" She denied that appellant made any admissions to her. She testified that she lied to SA Dick because appellant gave her "a hard time" after she had an affair in 1991, and she saw her interview with SA Dick as an opportunity to "repay what he did to me."

The military judge sustained a hearsay objection when trial counsel attempted to introduce Mrs. Ureta's statement to the OSI, but he told trial counsel "you can ask the witness if certain parts of this are true." Trial counsel then questioned Mrs. Ureta about the statement line–by–line. With no defense objection, trial counsel read each sentence, and asked her if she said it and whether it was true. She responded each time that the statement read was not true. The written statement was not received in evidence.

Trial counsel then questioned Mrs. Ureta about her Article 32 investigation testimony. Again, trial counsel read the questions and answers and asked Mrs. Ureta if that was her testimony. She consistently responded that her responses were lies. Again, defense counsel did not object.

Trial counsel offered the transcript of Mrs. Ureta's Article 32 testimony. Defense counsel did not object to trial counsel's examination of Mrs. Ureta about her Article 32 testimony but objected to admission of the Article 32 transcript. The military judge opined that the Article 32 testimony of Mrs. Ureta was admissible as substantive

evidence under Mil.R.Evid. 801. He asked defense counsel if he disagreed, and defense counsel responded: "As much as I would like to, I believe that you have accurately stated the current status of the law."

Discussion

In its review of the legal and factual sufficiency of the evidence, the court below noted: "Convictions based solely on hearsay are troubling, even if the military judge committed no errors in admitting the hearsay." 41 MJ at 580. The dissenting opinion of the court below recites: "Appellant was convicted of child sexual abuse solely on the basis of out of court statements of sexual abuse made by his 13 year old daughter." 41 MJ at 581. Neither of these statements is entirely accurate.

Regarding the former, appellant was not convicted "based solely on hearsay." The Article 32 testimony of Mrs. Ureta was admitted as substantive evidence under Mil.R.Evid. 801(d)(1). This Rule provides that a prior statement by a witness is *not* hearsay if "[t]he declarant testifies at the trial or hearing and is subject to cross–examination concerning the statement, and the statement is . . . inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition[.]"

Regarding the latter, appellant was not convicted solely on the basis of K's out–of–court statements. K's statements were supported by appellant's admissions of guilt to his wife (Pros.Ex. 3) and Maj Boos' physical examination.

Appellant has not challenged the legal sufficiency of the evidence before our Court but has challenged admissibility of the evidence against him. We will discuss each of his challenges seriatim.

Videotaped OSI Interview (Issue I)

[1] Defense counsel conceded that K was unavailable as a witness. The military judge admitted the videotape under Mil.R.Evid. 804(b)(5) as "residual hearsay." Appellant contends that the military judge erred in concluding that the statement met the requirement for "circumstantial guarantees of trustworthiness." The Government argues that the military judge's findings of fact are supported by the evidence and support his conclusion that the videotape meets the requirements of Mil.R.Evid. 804(b)(5).

Both Mil.R.Evid. 803(24) and 804(b)(5) relate to "residual hearsay." We generally have analyzed the "circumstantial guarantees of trustworthiness" the same way under both rules. As we noted in *United States v. Lyons,* 36 MJ 183, 186 n. 2 (CMA 1992), "The only difference [between the two Rules] is that, unlike the former, the latter applies only when the declarant of the prior statement is not available."

In *United States v. McGrath,* 39 MJ 158, 164–67 (1994), however, we identified a fundamental difference between the two rules. Where the declarant actually testifies, the military judge may look beyond the circumstances of the declaration and consider corroborating evidence to determine if the declaration is sufficiently trustworthy to be admitted. Where the declarant does not testify, however, the military judge may consider only those circumstances "that surround the making of the statement and that render the declarant particularly worthy of belief." *United States v. Pollard,* 38 MJ 41, 49 (CMA 1993), quoting *Idaho v. Wright,* 497 U.S. 805, 819, 110 S.Ct. 3139, 3148, 111 L.Ed.2d 638 (1990).

[2] Examples of circumstances that may be considered, when the declarant is unavailable, include spontaneity,

consistent repetition, mental state of the declarant, and lack of motive to fabricate. 497 U.S. at 821–22, 110 S.Ct. at 3149–50. In addition, use of open–ended, non–leading questions; repeated emphasis on truthfulness; and declarations against the declarant's interest (*e.g.,* not being able to go back home) tend to support trustworthiness of the declaration. *United States v. Pollard,* 38 MJ at 50; *United States v. Lyons,* 36 MJ at 186. Statements elicited by law enforcement officials are regarded with caution but are not *per se* inadmissible. *United States v. Pollard,* 38 MJ at 49; *United States v. Giambra,* 33 MJ 331, 334 (CMA 1991).

Even if it meets the reliability test, however, evidence may not be admitted as "residual hearsay" unless it is "necessary" to prove the case and "more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts." Mil.R.Evid. 803(24). *See United States v. Giambra,* 33 MJ at 334 (residual hearsay must be "necessary").

[3] The military judge's decision to admit "residual hearsay is entitled to 'considerable discretion' on appellate review." *United States v. Pollard,* 38 MJ at 49. We hold that the military judge did not abuse his discretion by admitting the OSI interview videotape.

Even though K was interviewed at the OSI offices, the "police station" atmosphere was attenuated by the presence of her best friend (JH) and JH's mother, in whom K had first confided. The military judge was satisfied, as are we after viewing the videotape, that the questions were not suggestive. The interview was 2 days after that last incident of abuse. The military judge noted, as did the military judge in *Pollard,* that the victim was making herself homeless by accusing her father.

[4] Appellant argues that the military judge erred by

considering extrinsic corroboration--the previous statements to JH and Maj Boos—in assessing the reliability of the videotape. We disagree. The military judge properly considered K's statements immediately before the OSI interview as indicia of "consistent repetition." *See* 38 MJ at 49. Given the compressed sequence of events, we conclude that K's consistent statements to JH and Maj Boos immediately before the OSI interview were part of "the circumstances surrounding the making of the statement." *Idaho v. Wright,* 497 U.S. at 820, 110 S.Ct. at 3149.

The requirement for "necessity" was met. K's out–of–court declarations were the only evidence, other than appellant's partial admissions, that appellant was responsible for the abnormal physical evidence noted by Maj Boos. Finally, K's videotaped interview was more probative than any other reasonably available evidence. It was the only evidence coming directly from K's mouth and not filtered through another declarant.

Statements to Maj Boos (Issue II)

[5] The military judge admitted K's statements to Maj Boos under Mil.R.Evid. 803(4), the so–called "medical exception" to the hearsay rule. The rule provides that out–of–court statements are not excluded if they are "made for purposes of medical diagnosis or treatment and described medical history, or past or present symptoms, pain, or sensation, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment."

We stated in *United States v. Faciane,* 40 MJ 399, 403 (CMA 1994) that evidence

> offered under Mil.R.Evid. 803(4) must satisfy a two–pronged test: "first the statements must be

> made for the purposes of 'medical diagnosis or treatment'"; and second, the patient must make the statement "with some expectation of receiving medical benefit for the medical diagnosis or treatment that is being sought." A key factor in determining whether the second prong is met is "the state of mind or motive of the patient in giving the information . . . and the expectation or perception of the patient that if he or she gives truthful information, it will help him or her to be healed."

(Citations omitted.)

The military judge made the following findings of fact regarding K's statements to Maj Boos:

> The declarant was 13 years old at the time, was of at least average intelligence, and fully understood that Dr. Boos' interview and physical examination of her was being done for purposes of medical diagnosis and treatment. She expected medical treatment and her statements were made in order to receive that treatment.

[6] A military judge's finding that the declarant had "an actual expectation of receiving medical treatment" is a preliminary finding of fact. As such, it will not be overturned on appeal unless it is clearly erroneous. *United States v. Quigley*, 40 MJ 64, 66 (CMA 1994).

We hold that the military judge's finding is not clearly erroneous. There is ample evidence to support his finding that Maj Boos' interview was for medical diagnosis or treatment and that K provided information expecting treatment. K was old enough and intelligent enough to understand what was happening. Maj Boos identified himself as a pediatrician, questioned K in a hospital setting, performed a physical

examination, conducted laboratory tests for pregnancy and sexually transmitted disease, and explained to K why he needed the information.

Impeachment of Mrs. Ureta (Issue III)

[7] Appellant argues that the military judge erred by permitting trial counsel to call Mrs. Ureta as a witness for the sole purpose of impeaching her. *See United States v. Pollard,* 38 MJ 41 (CMA 1993). The Government argues that *Pollard* is distinguishable because trial counsel did not know what, if anything, Mrs. Ureta would say. The Government points out that Mrs. Ureta's statement to the OSI was not admitted and that the military judge gave the members a proper limiting instruction. Answer to Final Brief at 21–22.

In *Pollard,* we held that the military judge abused his discretion by permitting trial counsel to call a "witness on the merits for the primary purpose of placing otherwise inadmissible evidence before" the members "under the guise of impeachment." 38 MJ at 50. Key to our analysis in *Pollard* was that "[t]rial counsel and the military judge knew beforehand that [the witness] would recant her pretrial statement in front of the court members, because she had done so in the hearing on admissibility of her pretrial statements." 38 MJ at 50–51.

In appellant's case trial counsel did not know if Mrs. Ureta would testify or, if she did, what she would say, because Mrs. Ureta refused to discuss the case with him. Based upon her OSI statement and her sworn testimony at the Article 32 hearing, trial counsel had reason to believe that she would provide evidence that appellant had admitted sexually abusing his daughter. Accordingly, we hold that the military judge did not err by permitting trial counsel to question Mrs. Ureta about her statement to SA Dick. Furthermore, assuming *arguendo* that the examination was error, it was forfeited by defense counsel's failure to object and does not rise to the

level of plain error. Mil.R.Evid. 103(a)(1) and (d); *United States v. Olano,* 507 U.S. 725, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). Finally, even assuming *arguendo* that any error in the examination of Mrs. Ureta was not forfeited, such error was harmless and did not materially prejudice appellant. Art. 59(a), UCMJ, 10 USC § 859(a). The same matters were covered in greater detail in the transcript of her Article 32 testimony, which was properly admitted as substantive evidence, as discussed *infra.*

Admission of Article 32 Hearing Transcript (Issue IV)

[8] Appellant argues that the military judge erred by admitting Mrs. Ureta's testimony at the Article 32 hearing. He argues that, if the declarant is available to testify—as she was—and admits to the inconsistency of the extrinsic evidence—which she did—then extrinsic evidence of the prior inconsistent statement is inadmissible. *See* Mil.R.Evid. 613(b). The Government argues that any error was forfeited because defense counsel conceded that the Article 32 testimony was admissible.

Mil.R.Evid. 613(b) provides:

> Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require.

In *United States v. Gibson,* 39 MJ 319, 324 (CMA 1994), we reaffirmed our earlier interpretation of Mil.R.Evid. 613(b) in *United States v. Button,* 34 MJ 139 (CMA 1992): "'[E]xtrinsic evidence of a prior inconsistent statement should not be admitted for impeachment when (1) the declarant is available and testifies; (2) the declarant admits making the

prior statement; and (3) the declarant acknowledges the specific inconsistencies between the prior statement and his or her in–court testimony.'" (Citations omitted.)

On the other hand, Mil.R.Evid. 801(d)(1) provides, "A statement is not hearsay if: . . . The declarant testifies at the trial or hearing and is subject to cross–examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition. . . . " Reading the two rules together, we hold that the Article 32 transcript could "not be admitted for impeachment" under Mil.R.Evid. 613(b) but was admissible as substantive evidence in its own right under Mil.R.Evid. 801(d)(1)(A). Under the circumstances, it was proper for trial counsel to use Mrs. Ureta to lay the foundation for admission of her Article 32 testimony and for the military judge to admit the transcript as substantive evidence. *See* S. Saltzburg, L. Schinasi, & D. Schlueter, *Military Rules of Evidence Manual,* Editorial Comment at 761–62 (3d ed. 1991) (distinguishing between eliciting inconsistent statements that are admissible as substantive evidence and those that do not qualify under Mil.R.Evid. 801(d)(1)(A)).

[9] The question remains whether the military judge erred by permitting the court members to take the Article 32 hearing transcript into their deliberations. In *United States v. Austin,* 35 MJ 271, 276 (CMA 1992), we examined RCM 921(b) and held that it was error to allow the court members to take a verbatim Article 32 transcript into deliberations. We noted that the error was "not *per se* reversible error" but must be tested for prejudice. 35 MJ at 277 n. 6.

Defense counsel did not object to the members' taking the transcript into deliberations. Since this case was tried before *Austin* was decided, we will not apply a forfeiture and

plain–error analysis. We hold that the military judge erred by permitting the members to take the transcript of Mrs. Ureta's Article 32 hearing testimony into their deliberation room.

We hold further that the error was harmless. Unlike *Austin,* the transcript was not the only evidence against appellant. It was relevant only on the question whether appellant admitted his guilt to Mrs. Ureta. In addition to his admission of guilt, appellant was confronted with the videotaped statement of his daughter, the testimony of Maj Boos, and the testimony of Capt Rohbock. Under the circumstances, we see no reasonable possibility that the finders of fact were influenced by the error. *See United States v. Barnes,* 8 MJ 115, 116 (CMA 1979).

Decision

The decision of the United States Air Force Court of Criminal Appeals is affirmed.

Chief Judge COX and Judge CRAWFORD concur.

EVERETT, Senior Judge (dissenting):

I do not agree with the majority that the military judge did not err when he admitted into evidence Dr. Boos' testimony concerning statements made to him by the alleged victim [K], *see* Mil.R.Evid. 803(4), Manual for Courts–Martial, United States (1995 edition); neither do I agree with the majority that the military judge did not abuse his discretion when he admitted into evidence the videotape of an interview with K by an agent of the Office of Special Investigations (OSI), *see* Mil.R.Evid. 804(b)(5). Accordingly, in each instance, I agree with Chief Judge Dixon who dissented below, *see* 41 MJ 571, 581–87 (1994), that appellant was denied his constitutional confrontation right to cross–examine K, *see Idaho v. Wright,* 497 U.S. 805, 110

S.Ct. 3139, 111 L.Ed.2d 638 (1990), and that the error was not harmless beyond a reasonable doubt, *see Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

In *United States v. Clark,* 35 MJ 98, 105 (1992), this Court wrote that, when considering applicability of the medical–treatment exception to the exclusionary hearsay rule, *compare* Mil.R.Evid. 801 and 802 *with* Mil.R.Evid. 803(4),

> "we look to the state of mind or motive of the patient in giving the information to the physician and the expectation or perception of the patient that if he or she gives truthful information, it will help him or her to be healed." *United States v. White,* 25 MJ 50, 51 (CMA 1987).

Put another way:

> Thus, "unless it appears that the child knows at least that the person is rendering care and needs the information in order to help, the rationale for the exception disappears entirely." *United States v. Avila,* 27 MJ 62, 66 (CMA 1988), *affirmed after remand,* 29 MJ 299, *cert. denied,* 493 U.S. 1002, 110 S.Ct. 562, 107 L.Ed.2d 557 (1989).

United States v. Clark, supra at 105.

Despite the requirement that medical–treatment hearsay evidence meet this underpinning of Mil.R.Evid. 803(4) if it is to be admitted under that exception, it does not appear that it was satisfied in this case. The OSI agent who conducted this investigation acknowledged that K did not ask to be taken to the hospital. Instead, she was taken there only after he had "asked her if she would consent to an examination *because medical evidence had to be gathered in these types of allegations.*" (Emphasis added.) Dr. Boos did testify that, when beginning his interview of K, he had told her that he

"wanted to talk to her and to examine her to see whether any harm had come to her, whether she had caught any infections; but that before I started, to do the best job I needed to hear her story from herself."

As Chief Judge Dixon opined, this superficial record does not support a conclusion that K expected to receive medical help from Dr. Boos and that this help depended on her giving full and truthful information to the doctor. In fact, if anything, the record more likely suggests that K merely was asked to repeat to Dr. Boos the "story" she had told the OSI and that she anticipated a mere physical examination. At best from the Government's standpoint, the record is ambiguous, and ambiguity does not suffice for admissibility. Accordingly, in the absence of supporting evidence, I believe that the military judge was clearly erroneous in concluding that K had made her statements in the expectation of obtaining medical treatment.

As to the videotaped interview of K by the OSI, I am content to refer the reader to Chief Judge Dixon's treatment of that issue, 41 MJ at 584–86. For the reasons discussed by him, I believe that the Government has not carried its burden of "showing particularized guarantees of trustworthiness," *see Idaho v. Wright, supra* at 815, 110 S.Ct. at 3146—that is, circumstances "that surround the making of the statement and that render the declarant particularly worthy of belief." *Id.* at 819, 110 S.Ct. at 3148; *accord United States v. Lyons,* 36 MJ 183, 186 (CMA 1992), and *United States v. Clark, supra* at 106.

Accordingly, I conclude that appellant has been denied his constitutionally assured right to confrontation as to the hearsay evidence from K, admitted through the testimony of Dr. Boos and the videotaped interview by the OSI. Further, there can be no sincere claim that this denial was harmless

beyond a reasonable doubt. As a result, this conviction should be reversed; so I must dissent from the majority's decision to affirm it.

SULLIVAN, Judge (dissenting):

I join Senior Judge Everett's well–reasoned dissent—that is where justice is in this case.

APPENDIX B

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Master Sergeant JOSE M.C.R. URETA, FR562–94–6699
United States Air Force

ACM 30274

3 November 1994

_ M.J. _

Sentence adjudged 21 August 1992 by GCM convened at Rhein–Main Air Base, Germany. Military Judge: Wade B. Morrison.

Approved sentence: Bad–conduct discharge, confinement for 10 years, and reduction to E–1.

Appellate Counsel for Appellant: Mr. David R. Dowell, Esq. (argued), Colonel Terry J. Woodhouse, Colonel Jay L. Cohen, Lieutenant Colonel Frank J. Spinner, and Captain Robert I. Smith.

Appellate Counsel for the United States: Major Barnard N. Madsen (argued) and Colonel Jeffery T. Infelise.

Before

DIXON, YOUNG, and BECKER
Appellate Military Judges

OPINION OF THE COURT

BECKER, Judge:

Despite his pleas, a general court–martial composed of members convicted the appellant of one specification of rape and one specification of carnal knowledge in violation of Article 120, UCMJ,[1] and one specification of indecent acts with a child in violation of Article 134, UCMJ.[2] In each instance, the appellant's alleged victim was his adolescent daughter, whom we will refer to as "K." The court sentenced the appellant to a bad–conduct discharge, confinement for 10 years, and reduction to the grade of E–1. Appellant makes twelve assignments of error, four of which we will discuss. Three of these allege the military judge erred in admitting statements of K into evidence as exceptions to the rule against hearsay. The other alleges the military judge erred by ruling on a motion for a finding of not guilty as to the rape specification in such a way that he created a new specification alleging carnal knowledge. We resolve all of the hearsay issues against the appellant, and affirm his convictions of rape and indecent acts. However, we find the military judge committed plain error requiring us to set aside the carnal knowledge conviction and dismiss that specification. This, in turn, requires us to reassess the appellant's sentence.

---

[1] 10 U.S.C. § 920 (1988).

[2] 10 U.S.C. § 934 (1988). The accused was found not guilty of a specification alleging attempted forcible sodomy under Article 125, UCMJ (10 U.S.C. § 925 (1988)).

I. BACKGROUND

K and her family lived on Rhein–Main Air Base, Germany. On the afternoon of 17 March 1992, K (who was, at this time, 13 years old) confided to her best friend, JH, that her father had been "messing" with her and that she did not want to go home. JH asked if K wanted to talk to JH's mother, and K agreed. After listening to K, Mrs. H contacted Security Police at Rhein–Main. Mrs. H and K eventually were referred to Special Agent Dick of the Rhein–Main detachment of the Air Force Office of Special Investigations (AFOSI). Agent Dick and another AFOSI agent interviewed K for about thirty minutes, during which K repeated her accusations of sexual abuse by her father. Agent Dick then asked K if she would consent to a medical examination, informing K that these types of allegations required the gathering of medical evidence. K agreed.

On 18 March 1992, Agent Dick and Mrs. H accompanied K to the Rhein–Main base hospital where K saw Doctor Boos, an Air Force pediatrician. Before K's arrival, AFOSI had briefed Doctor Boos on K's allegations. Doctor Boos had experience in cases of suspected sexual abuse of children, to include an appreciation that what K told him might be admissible as evidence in a subsequent court–martial. When K arrived at the hospital, Doctor Boos introduced himself to her as a pediatrician. He informed her that he needed to find out if any harm had come to her, if she was hurt, if she had caught any infections or had other medical problems, and, to do his best job, he needed to hear her story. K then told Doctor Boos that her father, the accused, had been touching her sexually and having sexual intercourse with her since she was nine years old. K also described to Doctor Boos physical abuse by her mother. Doctor Boos conducted a pelvic examination of K, which revealed notching of K's hymen and a papule located on her labia majora. According to Doctor

Boos, the condition of K's hymen was consistent with sexual intercourse and the papule might have been caused by a sexually transmitted virus. However, the notching of the hymen could have been caused by something other than sexual activity, and the cause of the papule could not be confirmed because K had declined to appear for further examinations. Doctor Boos also took specimens and ordered tests for other sexually transmitted diseases, which yielded negative results.

Following Doctor Boos' examination, K, Mrs. H, and Agent Dick returned to the AFOSI office. K was again interviewed and repeated the allegations of sexual abuse by her father. This time, Agent Dick recorded the interview on videotape.

Also on 18 March 1992, K met with Captain Rohback, a social worker assigned as Family Advocacy Officer at Rhein–Main. Air Force regulations required Captain Rohback to gather information on allegations of child sexual abuse, formulate risk assessments, and provide therapy and other treatment as needed. Captain Rohback introduced himself to K, and informed her that he needed to gather information relating to her allegations. He told K that his purpose was to assess the risk she faced, help protect her, assist her in dealing with complications, discomfort and emotional problems, and provide for any treatment she might need. Captain Rohback told K that he needed to understand from her why she was out of her home, and that listening to her would help him understand her needs. K then described acts of sexual abuse by her father, consistent with what she had told Doctor Boos and Agent Dick. Captain Rohback and K met five more times, on 19 and 20 March, 9 and 13 April, and 19 May 1992. During these sessions, K reaffirmed her descriptions of sexual abuse by the accused. She also related attempts by other family members to persuade her to take back her accusations.

Charges of rape, attempted forcible sodomy, and indecent acts with a child were preferred against the accused on 23 March 1992. Shortly before the Article 32, UCMJ,[3] investigation into the charges, K retained the services of an American civilian lawyer practicing in Germany. On K's behalf, this lawyer submitted a letter to Air Force legal authorities to the effect that K would assert her right under German law to refuse to either testify or submit to interviews concerning allegations against her father. Attached to this letter was a statement, apparently signed by K, recanting all of her prior accusations of sexual abuse. In this statement, K said she had made up the "lies" as a means of forcing her father to pay attention to the abusive situation created by her mother.

In an initial Article 39(a), UCMJ,[4] session, the defense moved *in limine* to exclude various hearsay declarations from K, including the videotaped interview with AFOSI and her statements to Doctor Boos and Captain Rohback. Both sides agreed that K could not be compelled to testify against her father under German law, that the prosecution had attempted to obtain K's presence by sending a letter and invitational travel orders to her through her attorney, and that K had not responded. In addition, civilian defense counsel stated "I will concede on behalf of the defense for purposes of your ruling on availability versus unavailability, that as a factual matter were [K] to be called to the stand she would refuse to testify." R 12. The military judge eventually ruled that K was unavailable as a witness.

After hearing testimony from Doctor Boos and Agent Dick, and making essential findings of fact,[5] the military judge admitted K's videotaped interview under the so–called "residual hearsay" exception at Mil. R. Evid. 804(b)(5), and

---

[3] 10 U.S.C. § 832 (1988).
[4] 10 U.S.C. § 839(a) (1988).
[5] *See* Rule for Courts-Martial (R.C.M.) 905(d).

her declarations to Doctor Boos as statements for purposes of medical diagnosis or treatment under Mil. R. Evid. 803(4). The trial counsel announced that he did not intend to offer testimony from Captain Rohback, and the military judge did not rule on that aspect of the defense motion. Later in the trial, however, the court members requested Captain Rohback's testimony. The defense renewed its objection. After hearing Captain Rohback's testimony in an Article 39(a) session and making essential findings of fact, the military judge admitted K's declarations to Captain Rohback as statements for purposes of medical diagnosis or treatment under Mil. R. Evid. 803(4).

At the close of the prosecution's case–in–chief, the defense moved for a finding of not guilty to the rape specification. That specification alleged the accused had raped K at divers times from on or about 26 September 1989 to on or about 16 March 1992. Defense counsel argued that K's statements did not establish penetration or force, both essential elements of the crime of rape. The military judge found sufficient evidence of penetration to deny the motion on that ground. However, he determined that K had described only one act of forcible intercourse. Therefore, with the assent—indeed, the active assistance—of the defense, the military judge broke out a brand new "specification 2" of Charge II, which alleged carnal knowledge at divers times from on or about 26 September 1989 to on or about 15 March 1992. Apparently, the military judge and all counsel were under the impression that carnal knowledge was a lesser–included offense of rape.[6] After arguments and instructions, the members returned findings of guilty to the rape specification (now alleging a lone act on

[6] The military judge later instructed the members that carnal knowledge was a lesser included offense of rape. R 478–479. The defense counsel expressly concurred in this instruction. R 347.

or about 16 March 1992) and the "new" specification alleging carnal knowledge, as well as to the specification alleging indecent acts.

II. HEARSAY

A. Standard of Review

In deciding whether the admissions of K's hearsay declarations were proper, we do not put ourselves in the shoes of the military judge to see if we would have made the same ruling. Rather, our review of a military judge's decision to admit evidence is limited to whether he has abused his discretion. *United States v. Dorsey,* 38 M.J. 244, 246 (C.M.A. 1993); *United States v. Ortiz,* 35 M.J. 391, 393 (C.M.A. 1992). In doing so, we ordinarily defer to the military judge's findings of fact unless they are unsupported by evidence of record or clearly erroneous. *United States v. Quigley,* 40 M.J. 64, 66 (C.M.A. 1994); *United States v. French,* 38 M.J. 420, 425 (C.M A. 1993); *United States v. Evans,* 37 M.J. 867, 868 (A.F.C.M.R. 1993). However, we have an independent duty to affirm only those convictions and sentences which are correct in law and fact. Article 66(c), UCMJ.[7]

Because K was not available to testify at the trial,[8] the

---

[7] 10 U.S.C. § 866(c) (1994).

[8] We question, as did the military judge, whether K had a legal right to refuse to testify. Accepting the parties' agreement that German law conferred a privilege not to testify *against* her father, we nonetheless note that K's position as of trial was that she had lied to Doctor Boos, Captain Rohback and Agent Dick. How German law may have accorded her the right to refuse to testify *on her father's behalf* is not clear. Moreover, under American law at least, it is the law of the *forum* which controls whether a privilege exists. *United States v. Parker,* 15 M.J. 146, 151 (C.M A. 1983); *Pritchard-Keang Nam Corp. v. Jaworski,* 751 F.2d 277, 281 (8th Cir. 1984), *cert. dismissed,* 472 U.S. 1022 (1985). The Military Rules of Evidence recognize no parent-child testimonial privilege. *See* Mil. R. Evid.

admission of her hearsay declarations raises issues under the Confrontation Clause of the Sixth Amendment to the United States Constitution. Our approach to the confrontation issue differs depending on the rule of evidence relied upon in admitting K's declarations. If an exception to the rule against hearsay is one of the so–called "firmly rooted" exceptions, then compliance with the evidence rule alone will satisfy the Confrontation Clause. *Ohio v. Roberts,* 448 U.S. 56, 66 (1980). If, however, the rule involved is not one of the "firmly rooted" hearsay exceptions, then the statement must be examined, over and above the minimum requirements of the evidence rule, for "particularized guarantees of trustworthiness" which make the statement so trustworthy that adversarial testing would add little to its reliability. *Idaho v. Wright,* 497 U.S. 805, 819–820 (1990). Such indicia of trustworthiness must be apparent from the circumstances of the declaration, and not from reference to other evidence at trial. *Wright,* 497 U.S. at 822.

We now turn to the declarations in issue. Applying the above principles, we hold that the military judge did not abuse his discretion in admitting K's statements to Doctor

---

sec. V. Because the parties agreed that K was "unavailable," this concern is not adequately addressed in the record. In his findings supporting his denial of the defense motion *in limine* to exclude the 18 March 1992 videotaped interview, the military judge found that, under German law, the defense could have compelled K to testify *for* her father and, therefore, the accused's Sixth Amendment confrontation rights were not infringed. However, there is insufficient evidence of record to support this conclusion, and we will disregard it. We do not consider the accused to have, in any way, waived or forfeited his confrontation rights. In any event, the appellant has conceded K's unavailability, both at trial and before this court. The record also supports an inference that K was unavailable under Mil. R. Evid. 804(a)(5), and the military judge's findings to that effect are not clearly erroneous. Accordingly, in addressing the admissibility of K's videotaped AFOSI interview under Mil. R. Evid. 804(b)(5), we consider K to have been "unavailable as a witness."

Boos and Captain Rohback, and her videotaped interview by Agent Dick.

B. Statement to Doctor Boos

The military judge admitted this declaration as a "statement for purposes of medical diagnosis or treatment" under Mil. R. Evid. 803(4). This is a "firmly rooted" exception to the rule against hearsay. *Wright,* 497 U.S. at 820; *United States v. Clark,* 35 M.J. 98, 105 (C.M.A. 1992). Accordingly, in order to satisfy the Confrontation Clause, we need not examine K's statement to Doctor Boos for "particularized guarantees of trustworthiness" beyond the foundational elements of Mil. R. Evid. 803(4).

Mil. R. Evid. 803(4) provides that hearsay statements may be admitted if they are "made for purposes of medical diagnosis or treatment" and describe "medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." To support admission of a statement under this rule, the proponent's foundation must show (1) that the declarant had some expectations of promoting his or her well–being and, thus, an incentive to be truthful, and (2) the statement was made for the purpose of medical diagnosis and treatment. *United States v. Fling,* _ M.J. _, Misc. Dkt. 94–08, slip op. at 5 (A.F.C.M.R. 13 Sep. 1994), citing *United States v. Armstrong,* 36 M.J. 311 (C.M.A. 1993), and *United States v. Nelson,* 25 M.J. 110 (C.M.A. 1987), *cert. denied,* 484 U.S. 1061 (1988). "The key factor in determining whether a particular statement is embraced by the medical–treatment exception is 'the state of mind or motive of the patient in giving the information to the physician and the expectation or perception of the patient that if he or she gives truthful

information, it will help him or her to be healed."' *United States v. Morgan,* _ M.J. _, No. 93–1070, slip op. at 5 (C.M.A. 20 Sep. 1994), quoting *United States v. Clark,* 35 M.J. 98, 105 (C.M.A. 1992), and *United States v. White,* 25 M.J. 50, 51 (C.M.A. 1987).

K's statement to Doctor Boos meets these requirements. From Doctor Boos' testimony, it is clear there was a medical purpose to K's statements. Doctor Boos needed to know the nature of the sexual contact in order to decide the scope of his examination and treatment. For example, K related her father had engaged in sexual intercourse, but denied anal sodomy. Consequently, Doctor Boos conducted a vaginal examination, with tests for sexually transmitted disease, but did not perform a rectal examination. Doctor Boos' testimony also shows that K understood that Doctor Boos' would be making medical decisions based on what she told him, thereby providing her a clear incentive to be truthful. It was not required that K utter some formal affirmation that her statements were for medical purposes in order for them to be admissible under Mil. R. Evid. 803(4), as long as sufficient evidence supports an inference that she had that expectation. *United States v. Quigley, supra.* The evidence here is sufficient to support such an inference. This is not a case of an infant with limited capability to comprehend that telling the truth will be in her medical best interest. *Compare United States v. Faciane,* _ M.J. _, No. 93–1065 (C.M.A. 20 Sep. 1994); and *United States v. Williamson,* 23 M.J. 706 (A.F.C.M.R. 1986), *rev'd on other grounds,* 26 M.J. 115 (C.M.A. 1988). The military judge's findings that this 13 year old "expected medical treatment and her statements were made in order to receive that treatment" are not clearly erroneous. Accordingly, we hold that the military judge did not abuse his discretion in admitting K's statement to Doctor Boos.

In reaching this conclusion, we are mindful that both K

and Doctor Boos were aware that this examination had a legal purpose in addition to a medical one. In Doctor Boos' case, he fully appreciated the potential evidentiary value of K's statements to him and made his notes with a view toward making a clear record in the event they would be introduced at a trial. We do not believe this knowledge on the part of either K or Doctor Boos (or both) undermines the foundation for the admissibility of K's statements under Mil. R. Evid. 803(4). The evidence is still sufficient to infer that K, regardless of her awareness that the examination was part of the investigatory process, expected treatment from Doctor Boos, and understood it was in her medical best interest to be truthful with him. *See Morgan, supra,* slip op. at 6. For Doctor Boos' part, this is not a case where he was acting primarily as an investigator. *Compare United States v. Fink,* 32 M.J. 987, 992–993 (A.C.M.R. 1991). Nor does Doctor Boos' commendable appreciation for the legal consequences of his actions run afoul of the Court of Military Appeals' admonition that it "will not condone efforts to extend Mil. R. Evid. 803(4) to include the testimony of a [practitioner] whose examination of an alleged victim was more oriented to his testifying at trial than to medical diagnosis or treatment." *United States v. Deland,* 22 M.J. 70, 75 (C.M.A. 1986). K's statement to Doctor Boos was properly admitted into evidence under Mil. R. Evid. 803(4).

C. Statements to Captain Rohback

We reach similar conclusions concerning the military judge's admission of K's descriptions of sexual abuse to this social worker as "statements for the purpose of medical diagnosis and treatment" under Mil. R. Evid. 803(4). The scope of this rule is not limited to statements to licensed physicians, but also may include statements to other medical practitioners and mental health therapists, including social

workers. *United States v. Nelson,* 25 M.J. 110 (C.M.A. 1987); *United States v. White,* 25 M.J. 50 (C.M.A. 1987); *United States v. Welch,* 25 M.J. 23 (C.M A. 1987); *United States v. Williamson, supra,* 26 M.J. at 118. The testimony of Captain Rohback establishes that his interviews with K were for a valid medical purpose, and not "more oriented to his testifying at trial than to medical diagnosis or treatment." *Deland, supra.* It also supports the inference that K understood Captain Rohback's purpose in talking to her was to promote her physical and emotional well–being, and that her truthful statements would assist him in that process. *See United States v. Quigley, supra.* The military judge's findings to this effect are not clearly erroneous. Accordingly, we hold that the military judge did not abuse his discretion in admitting K's statements to Captain Rohback under Mil. R. Evid. 803(4).

D. Videotaped Interview with AFOSI

The military judge admitted this interview under Mil. R. Evid. 804(b)(5), the so–called "residual hearsay" exception. Residual hearsay rules are not "firmly rooted" exceptions to the rule against hearsay. *Idaho v. Wright, supra; United States v. Lyons,* 36 M.J. 183, 186 (C.M.A. 1992); *United States v. Pacheco,* 36 M.J. 530, 534 (A.F.C.M.R. 1992). Therefore, in addition to compliance with the foundational elements of Mil. R. Evid. 804(b)(5), we will examine K's statements during the interview for "particularized guarantees of trustworthiness" which will serve to satisfy the Confrontation Clause in the absence of cross–examination.

In admitting the videotaped interview, the military judge made findings which included the following:

> 6. [T]he purpose of videotaping child victims is to reduce the number of times the child has to tell his

or her story and to preserve evidence for possible future trial. The videotape has very clear audio and visual quality and restates in the declarant's own words and demeanor (as opposed to Dr. Boos' written notes) the complete substance of her allegations against the accused. Although the videotape repeats the allegations as stated to Dr. Boos, the videotape is the most probative evidence that the government can procure through reasonable efforts in light of the declarant's subsequent recantation.

7. The videotape interview has ample guarantees of trustworthiness. The declarant's statement was obtained without leading questions and is in her own words. It is the freely conceived product of the declarant as opposed to the result of suggestive interrogation. The statement is voluntary, is under oath, is detailed, is factual as opposed to conjectural, and is based on first–hand knowledge of the events. The declarant was relatively mature and aware of the need to be truthful, she lacked a motive to falsify at the time, she was a member of the accused's household and depended upon him for support, and she subjected herself to ridicule and social stigma among her friends and family by making the statement. The statement was made by the declarant shortly after the incident to which the statement relates with little opportunity to reflect, and is similar to other "firmly rooted hearsay exceptions," i.e., it is a restatement of allegations made earlier that same day to Dr. Boos in a very reliable setting that qualifies under MRE 803(4), and is also a restatement of allegations made the day before to [JH] in a reliable setting that nearly

qualifies [as an excited utterance] under MRE 803(2).[9]

* * * * * * * *

9. The declarant recanted her allegations against the accused prior to trial.

* * * * * * * *

DECISION

* * * * * * * *

3. Prosecution Exhibit 1, the videotape of 18 Mar 92, is admissible under MRE 804(b)5, since the declarant is unavailable, the exhibit is offered as evidence of a material fact, it is more probative of the point for which it is offered than any other evidence that the government can procure, it has circumstantial guarantees of trustworthiness, the accused's 6th Amendment right to confront his accuser is available to the accused,[10] and the interests of justice will be best served by admission of this exhibit. Moreover, the government's legitimate need for this evidence is not outweighed by any unfair prejudice to the accused.

These findings clearly satisfy the foundational elements of Mil. R. Evid. 804(b)(5). They are supported by evidence of record, and are not clearly erroneous. During oral argument, the appellant's counsel contended that the videotape was not

---

[9] The military judge granted the defense's motion *in limine* to exclude K's statements to JH on the afternoon of 17 March 1992. Notwithstanding this ruling, it was permissible for the military judge to consider JH's testimony in deciding whether to admit the videotaped interview. Mil. R. Evid. 104(a).

[10] To the extent this clause refers to the military judge's conclusion that, under German law, the accused could have compelled K's attendance as a witness, we will disregard it. See note 8, *supra.*

more probative than other evidence available to the prosecution (specifically, K's statements to Doctor Boos and Captain Rohback) and, therefore, the tape was not admissible under Mil. R. Evid. 804(b)(5). We reject this argument as patently without merit. Having determined that Mil. R. Evid. 804(b)(5) has been satisfied, the task remaining before us is to determine whether the videotaped interview possesses "particularized guarantees of trustworthiness" which meet the requirements of the Confrontation Clause in absence of the adversarial test of cross–examination.

Paragraph 7 of the military judge's findings includes several factors favoring the reliability of K's videotaped interview. All of these findings are based on evidence of record, and are not clearly erroneous. To the military judge's findings, we would add our own observation of K's sincere demeanor during the interview. Most of these factors have been recognized by the courts as supporting admission of hearsay statements from children consistent with the Confrontation Clause. *Idaho v. Wright, supra,* 497 U.S. at 821, and cases cited therein; *United States v. Pollard,* 38 M.J. 41, 50 (C.M.A. 1993);[11] *United States v. Lyons, supra,* 36 M.J. at 186–187; *United States v. Clark,* 35 M.J. 98, 106 (C.M.A. 1992). In our review of K's interview, we also note the absence of factors which courts have viewed as undermining the reliability of children's pre–trial statements. Specifically, there was no indication that K, prior to the videotaped interview, had been under the influence of someone hostile to the accused or would refuse to testify against him, no *ex parte* presence of prosecuting attorneys,

[11] In *Pollard,* the six-year-old girl was present as a witness and subject to cross-examination. Therefore, the basis for admitting her prior statements was Mil. R. Evid. 803(24). However, during testimony she was "withdrawn and generally uncommunicative." 38 M.J. at 50. It appears that the court could have properly applied Mil. R. Evid. 804(a)(2) or (4) to have considered the girl "unavailable."

and no appearance that Agent Dick's sole purpose in taping K was to "build a criminal case" against the accused. *United States v. Harjak,* 33 M.J. 577, 582 (N.M.C.M.R. 1991); *United States v. Palacios,* 32 M.J. 1047, 1052–1053 (A.C.M.R. 1991), *rev'd on other grounds,* 37 M.J. 366 (C.M. A. 1993).

The only factors which run contrary to the military judge's determination are K's subsequent recantation, the "motive" for her "lies" as explained by K in her recantation, and the fact that the interview was conducted by a law enforcement official. The circumstances of K's recantation are highly suspect. Her asserted motive to fabricate makes little sense and appears contrived. We agree with the military judge that K's recantation does not prevent the conclusion that the videotaped interview possesses sufficient indicia of reliability to satisfy the Confrontation Clause.

Regarding Agent Dick's role as K's interviewer, we share Judge Cox's concern whether statements obtained by law enforcement officials possess "such a degree of bipartisanship that an accused cannot reasonably contend that the purposes of cross–examination have not been served." *United States v. Hines,* 23 M.J. 125, 137 (C.M A. 1986). However, like Judge Cox, we are prepared to presume that investigators like Agent Dick conduct their activities in a professional manner, unless the contrary appears. *Id. See also United States v. Palacios, supra,* 32 M.J. at 1052–1053 n.10. In this case, however, the military judge did not have to presume any such thing, because the manner in which Agent Dick conducted K's interview was visually and audibly duplicated on the videotape. As stated by the military judge in his findings, K's statements were "obtained without leading questions and [are] in her own words." They were "the freely conceived product of the declarant as opposed to the result of suggestive interrogation." We also note that the presence of K's best

friend (JH) and JH's mother during the interview was an added factor which militated against any "station house" intimidation. Unless we are prepared to hold (which we are not) that statements obtained by law enforcement officials *never* pass constitutional muster as residual hearsay, then we may not rely on this fact alone to hold the military judge erred in admitting this interview.

We believe K's 18 March 1992 videotaped interview with Agent Dick possesses sufficient "particularized guarantees of trustworthiness" such that cross–examination would have had marginal utility for the accused. During oral argument, we directly asked appellant's counsel what points could have been made by trial defense counsel if K had been present for cross–examination. Appellant's counsel suggested he might have asked K if penetration had occurred and whether any force was involved. Yet, these questions would have been completely contrary to the accused's theory at trial, which was that K was lying about everything. The accused was permitted to introduce into evidence K's written statement recanting her accusations. If K had been present as a witness, the defense certainly could not have obtained from her any greater concession than that. It is disingenuous to argue that, but for the lack of an opportunity to cross–examine, the defense would have been able glean favorable details about events which the witness would deny occurred. We hold that the military judge did not abuse his discretion in admitting K's videotaped 18 March 1992 interview with Agent Dick under Mil. R. Evid. 804(b)(5).

E. Hearsay and Factual Sufficiency

Although holding the military judge did not abuse his discretion in admitting any of K's hearsay statements, we are mindful of our Article 66(c) obligation to affirm findings of

guilty only if we are persuaded of the appellant's guilt beyond a reasonable doubt. *United States v. Turner,* 25 M.J. 324, 325 (C.M A. 1987). Convictions based solely on hearsay are troubling, even if the military judge committed no errors in admitting the hearsay. However, based on the totality of the evidence, we are convinced beyond a reasonable doubt that the appellant is guilty of rape and committing indecent acts upon the body of his daughter.

III. CARNAL KNOWLEDGE "SPECIFICATION"

The military judge committed plain error when he ruled on the accused's motion for a finding of not guilty of rape in such a way as to fashion a brand new specification alleging carnal knowledge. This requires us to set aside the accused's conviction of that specification and reassess his sentence.

Although the military judge did not expressly acquit the accused of rape for any of the divers incidents alleged from 26 September 1989 up to but excluding the one on 16 March 1992, his decision to "rule for the defense" was, in effect, a finding of "not guilty" of rape as to that portion of the specification. R.C.M. 917(e). Such findings are final when announced and may not be reconsidered, *United States v. Hitchcock,* 6 M.J. 188 (C.M.A. 1979); R.C.M. 917(f).

The military judge believed—as did all counsel, apparently—that carnal knowledge was a lesser–included offense of rape. In an attempt to exercise his authority under R.C.M. 917(e) to grant a motion for a finding of not guilty for a greater offense, while not doing so for a lesser–included offense, the military judge then crafted a carnal knowledge specification and had it listed on the charge sheet as "specification 2" of Charge II. This was accomplished with the active assistance of the defense counsel. Even if the military judge had been correct about carnal knowledge being

a lesser–included offense of rape, we question whether this was the correct procedure. *See* R.C.M. 917(e), which sets out the procedure to use in such cases.

In any case, we hold that carnal knowledge is not a lesser–included offense of rape, at least where (as here) the rape specification does not allege the victim's age as being under 16, thereby putting the accused on notice to defend against it as well as the principal offense of rape. *Schmuck v. United States,* 489 U.S. 705 (1989); *United States v. Smith,* 7 M.J. 842 (A.C.M.R. 1979); Article 79, UCMJ;[12] MCM app. 21 ¶ 45d. *See also United States v. Emmons,* 31 M.J. 108, 111 (C.M.A. 1990); MCM Part IV ¶ 2b. Therefore, the military judge should have simply granted the motion for a finding of not guilty as to the affected portion of the specification of Charge II, without breaking out a new "specification 2."

We consider this to have been plain error not waived by the defense. This is not a case where an instruction on a legitimate lesser–included offense is affirmatively waived by the defense. *Compare United States v. Strachan,* 35 M.J. 362 (C.M.A. 1992), *cert. denied,* _ U.S. _,113 S. Ct. 1595 (1993); and *United States v. Spears,* 39 M.J. 823 (A.F.C.M.R. 1994). We also reject the government's reliance on R.C.M. 603(d). That rule states that "major" changes to charges and specifications may not be made "over objection of the accused unless the charge or specification affected is preferred anew." The government concedes this new specification was a "major" change to the charge without benefit of preferral, but argues the accused's failure to object permitted it. We are not prepared to extend R.C.M. 603(d) to this situation, where the defense acquiesced in the mid–trial creation of a new allegation based on an erroneous assumption that it reflected a lesser–included offense of the properly charged offense.

---

[12] 10 U.S.C. § 879 (1988).

Accordingly, we will set aside the finding of guilty of specification 2 of Charge II, and dismiss that specification. Because the acts reflected in that specification (sexual intercourse with his adolescent daughter over a two and one–half year period) formed a significant portion of the offenses for which the accused was sentenced, we cannot conclude that the accused suffered no harm from this error. Therefore, we must now consider whether to reassess the sentence or return the case for a rehearing on sentence.

In reassessing the appellant's sentence, we must try to determine what the sentence would have been absent the error. *United States v. Sales,* 22 M.J. 305, 307 (C.M.A. 1986). If we can determine what sentence probably would have been adjudged, we may do so; otherwise, we must return the case for a rehearing. *United States v. Jones,* 39 M.J. 315, 317 (C.M.A. 1994); *United States v. Peoples,* 29 M.J. 426 (C.M.A. 1990). If we are able to determine the sentence which probably would have been adjudged, we then must decide whether that sentence is nonetheless appropriate. *Peoples,* 29 M.J. at 428; *Sales,* 22 M.J. at 308.

After weighing the improper carnal knowledge conviction against the remaining convictions of rape and indecent acts with a child, we believe we can reassess the sentence. The impact of the carnal knowledge conviction was significant because of the number of incidents involved. However, the rape of K was the most serious offense for which the accused was convicted, and we are confident his conviction for this crime, along with his conviction for multiple incidents of indecent acts, had the greater effect on the sentencing process. Accordingly, we reassess the sentence and reduce the confinement portion to seven years. We have given individualized consideration to the seriousness of the convictions, the character and military performance of the appellant, and all circumstances documented in the record of

trial. *United States v. Snelling,* 14 M.J. 267 (C.M.A. 1982). We find the sentence, as reassessed, to be appropriate.

We resolve the remaining assignments of error against the appellant. We hereby set aside the finding of guilty of specification 2 of Charge II. The remaining findings of guilty, and that portion of the approved sentence which extends to a bad conduct discharge, confinement for seven years, and reduction to E–1, are correct in law and fact, and on the basis of the entire record are

AFFIRMED.

Judge YOUNG concurs.

DIXON, Chief Judge (dissenting):

Appellant was convicted of child sexual abuse solely on the basis of out of court statements of sexual abuse made by his 13 year old daughter. The central issue is whether the admission of the hearsay statements unfairly infringed upon appellant's right under the Sixth Amendment of the United States Constitution to confront his accuser. Appellant argues that hearsay evidence was erroneously admitted into evidence and his conviction should be set aside. I agree.

Over defense objections, the military judge allowed statements made by appellant's daughter to the OSI and to Dr. Boos, a pediatrician, to be presented as evidence. Despite the fact the daughter recanted her statements, did not appear at the Article 32 investigation, and was not present at trial, the military judge ruled her out of court statements did not unfairly infringe upon appellant's Sixth Amendment right to confront and cross–examine his accuser. On appeal, appellant claims the military judge misapplied the law in finding the evidence was admissible as exceptions to the hearsay rule. Government counsel argues the military judge's ruling on the admission of the hearsay evidence is entitled to "considerable discretion" and should be upheld by this Court absent an

abuse of discretion. *United States v. Pollard,* 38 M.J. 41, 49 (C.M.A. 1993); *United States v. Orsburn,* 31 M.J. 182 (C.M.A. 1990); *United States v. Bridges,* 24 M.J. 915 (A.F.C.M.R. 1987).

In my view, there was a clear abuse of discretion by the military judge since the circumstances which the law would deem as justification for admitting the doctor's testimony and the videotaped statement were missing. I believe it was error to admit the daughter's statement to Dr. Boos under Mil. R. Evid. 803(4) as a "statement for the purpose of medical diagnosis or treatment." Likewise, I believe it was error to admit her videotaped statement to the OSI under Mil. R. Evid. 804(b)(5) because the surrounding circumstances were insufficient to show "particularized guarantees of trustworthiness." *Idaho v. Wright,* 497 U.S. 805, 111 L.Ed.2d. 638, 110 S. Ct. 3139 (1990).

I. Does the Medical Exception Apply?

Were the statements made to Dr. Boos by appellant's daughter furnished under circumstances which warrant a presumption of their trustworthiness? I think not. An out of court statement is not admissible as a hearsay exception merely because it is made to a doctor. Nor is it admissible solely because the doctor uses the information for purposes of diagnosis or treatment. To be admissible as a hearsay exception the statement must be made for the purposes of medical diagnosis or treatment and must be made by a patient who has *some expectation of receiving medical benefit from the medical diagnosis or treatment that is being sought. United States v. Williamson,* 26 M.J. 115, 118 (C.M.A. 1988); *United States v. Deland,* 22 M.J. 70, 75 (C.MA. 1986).

In his findings of fact, the military judge concluded:

At approximately 1000–1030 hours, the declarant

> was interviewed by Major (Doctor) Stephen C. Boos, a pediatrician assigned to Wiesbaden Hospital. Mrs. Holman remained present during the examination at the declarant's request. The interview was conducted at the Wiesbaden Hospital in Dr. Boos' pediatric clinic. He informed the declarant that he was a doctor and that he was there to provide medical treatment for her. His questioning of the declarant was designed to elicit facts upon which he could base diagnosis and treatment. He physically examined the declarant and subjected her to clinical testing.
>
> The declarant was 13 years old at the time, was of at least average intelligence, and fully understood that Dr. Boos' interview and physical examination of her was being done for purposes of medical diagnosis and treatment. She expected medical treatment and her statements were made in order to receive that treatment.
>
> * * *
>
> The declarant's statements to Dr. Boos on 18 Mar 92 are admissible under MRE 803(4), since the statements were made for purposes of medical diagnosis and treatment, and with the expectation of receiving medical treatment.

The military judge's findings read like a classic case for the admission of hearsay evidence. Both prongs needed for admission, namely (1) made for purposes of medical diagnosis and treatment and (2) expectation of receiving medical treatment, are specifically found. However, it is impossible for me to accept the judge's findings based on a factual analysis of the record. His finding that the declarant "expected medical treatment and her statements were made in

order to receive that treatment" require a "leap of faith" that I'm unwilling to make. I choose *not* to adopt the military judge's findings when the circumstances surrounding the taking of the daughter to the hospital do not suggest she desired, asked for, or even appreciated the need for medical treatment. *United States v. Armstrong,* 36 M.J. 311, 313 (C.M. A. 1993).

A key question is why was appellant's daughter taken to the hospital? Did either of her parents take her for some type of treatment? No. Did Mrs. Holman, the person who initially heard about the sexual abuse and the person who took her the next morning to the OSI, suggest she needed medical attention? No. Did the OSI immediately refer her for medical attention? No, they first interviewed her for 30 minutes. Did anyone ask declarant if she would like to be seen by a doctor? Again, no.

The circumstances which brought appellant's daughter to the Wiesbaden Hospital were described in the following direct testimony of Special Agent Dick during the Article 39(a) session:

> Q. And how long did that first interview take?
>
> A. Approximately 30 minutes.
>
> Q. And that interview took place at the Law Enforcement Desk? Law Enforcement Office?
>
> A. Yes, sir. They had an empty room that we used.
>
> Q. Okay. What did you do then?
>
> A. At that point I called the clinic and had the Patient Affairs personnel grab Miss Ureta's records. We took Miss Ureta to the Wiesbaden hospital for medical examination.
>
> Q. Did she ask you to be taken to the hospital?
>
> A. No, sir.

Q. Indeed, you told her that we are going to do this, we are going to take you to the hospital for an examination?

A. No, sir. No, sir, I did not. I asked her if she would consent to an examination because medical evidence had to be gathered in these types of allegations.

Q. Did she sign a consent form?

A. I did not ask her for a consent form, that was the doctor's job. The doctor had to prove to himself that she was consenting to his medical examination.

The record shows appellant's daughter was told she was being taken to the hospital not for treatment or diagnosis, but rather for an examination for the purpose of obtaining medical evidence. The following direct testimony of Dr. Boos fails to disclose that she was at the hospital for anything other than an examination:

Q. All right, sir. As far as the examination of Katherine Ureta, when she came to your office who else, if anyone, was present?

A. Within my office, Mrs. Debra Holman was present.

Q. As far as prior to her coming into your office, was anyone else around?

A. Well, we had been notified that there was a suspected child sexual abuse being brought to the Emergency Room, and so we notified them that, you know, we would be able to see the case, that I would be able to clear my schedule and see the person. And then when nothing happened I went over there and eventually Katherine and Mrs. Holman and two OSI agents arrived, and I discussed

the case with the OSI agents in a back room while Katherine and Mrs. Holman were out in the waiting room.

Q. After this briefing on the case, what happened next?

A. Well, they had brought them to the Emergency Room and the Emergency Room notified us. The OSI was uncertain as to how the evaluation would be performed, whether it would be done in the Emergency Room by an emergency room physician or by a gynecologist, or by a pediatrician. And I informed them that I did most of these exams and that I preferred to do it because I had had some training and experience in the interview as well as I felt I could be, you know, more sympathetic and empathetic and supportive of the patient than a gynecologist. And I notified them that I was familiar with rape protocol and there are specimen collection needs, and then it was determined that I should do the exam. And then we left the back room and came out and had the patient and Mrs. Holman follow us to the waiting room. I went in, got my office ready, told my staff whet supplies I would need, and then we called Mrs. Holman and Katherine in and began the interview.

Q. Okay. And when they came in, what did you say to them?

A. Well, first I asked whether Katherine wanted to have Mrs. Holman there or whether I could talk to her alone, if she needed to have Mrs. Holman there. She indicated that she preferred to have Mrs. Holman there, so I had them both sit. Then I told them who I was, Dr. Boos, that I was a pediatrician,

> let them know that I had heard a little bit of Katherine's story and that I wanted to talk to her and to examine her to see whether any harm had come to her, whether she had caught any infections, but that before I started, to do the best job I needed to hear her story from herself.

I submit the government failed to show appellant's daughter was seeking medical treatment. When the medical exception to the hearsay rule is invoked, it is incumbent upon the moving party to show not only that the medical person was treating or diagnosing the patient, but also that the patient furnishing the information was seeking such help. *Williamson* at 118. In my view, this scenario makes the medical hearsay exception a sham. The doctor here was merely asking declarant to repeat the *story* she had already told Mrs. Holman and the OSI. The notion that she would be truthful because she was seeking medical help simply does not apply in this situation.

The medical exception to the hearsay rule presupposes something more than a mere physical examination. It requires the patient to believe something is medically wrong or that there is a medical condition that requires treatment. My common sense analysis of the circumstances tells me that appellant's daughter was not seeking or expecting a medical benefit when she was asked to tell her story to Dr. Boos. Consequently, I find no reasonable basis to conclude that it is likely that declarant was more truthful in relaying her story to Dr. Boos than she was in telling it to Mrs. Holman or the OSI. Everything she was told by the OSI and Dr. Boos indicates that because of her story (whether truthful or not), she would receive a medical examination. The premise underlying the exception is that one "undergoing diagnosis or receiving treatment from a trained medical professional has an incentive to be truthful because such answers will promote" the

patient's wellbeing. *United States v. Welch*, 25 M.J. 23, 25 (C.M.A. 1987). In situations like this, where it is not clearly shown that declarant was aware that she was being medically treated, the entire premise of the reliability of the offered statement dissipates. *United States v. Edens*, 31 M.J. 267, 269 (C.M.A. 1990). I find appellant was denied his right of confrontation and materially prejudiced by the erroneous admission of his daughter's hearsay statements to Dr. Boos.

II. Was Videotape Admissible as Residual Hearsay?

I also find the military judge's admission into evidence of the videotaped statement of appellant's daughter over defense objection to be error. Following her examination by Dr. Boos, appellant's daughter was taken back to the OSI office to be reinterviewed on videotape. She responded to questions posed by Special Agent Dick during a 35 minute session. In essence, she recounted the same story she had previously provided to Mrs. Holman, the OSI and Dr. Boos. In ruling the evidence admissible, the military judge stated:

> Prosecution Exhibit 1, the videotape of 18 Mar 92, is admissible under MRE 804(b)(5), since the declarant is unavailable, the exhibit is offered as evidence of a material fact, it is more probative of the point for which it is offered than any other evidence that the government can procure, it has circumstantial guarantees of trustworthiness, the accused's 6th Amendment right to confront his accuser is available to the accused, and the interests of justice will be best served by admission of this exhibit. Moreover, the government's legitimate need for this evidence is not outweighed by any unfair prejudice to the accused.

I find error in the admission of the videotaped statement

because it does not satisfy the "indicia of reliability" requirement established by *Idaho v. Wright, supra.* As in *Wright,* the question is not whether the declarant was unavailable, but rather whether the statement bore sufficient indicia of reliability to withstand scrutiny under the Confrontation Clause. In order to be admitted under the residual hearsay exception, an out of court statement must be supported by a "showing of particularized guarantees of trustworthiness." *Wright,* at 817. In other words, the surrounding circumstances must so clearly point to declarant's truthfulness that cross examination would be of marginal utility in the search for truth. *Idaho v. Wright, supra* at 820

In support of his decision to admit the videotaped statement, the military judge made the following findings:

> Although the videotape repeats the allegations as stated to Dr. Boos, the videotape is the most probative evidence that the government can procure through reasonable efforts in light of the declarant's subsequent recantation.
>
> The videotape interview has ample guarantees of trustworthiness. The declarant's statement was obtained without leading questions and is in her own words. It is the freely conceived product of the declarant as opposed to the result of suggestive interrogation. The statement is voluntary, is under oath, is detailed, is factual as opposed to conjectural, and is based on first–hand knowledge of the events. The declarant was relatively mature and aware of the need to be truthful, she lacked a motive to falsify at the time, she was a member of the accused's household and depended upon him for support, and she subjected herself to ridicule and social stigma among her friends and family by making the statement. The statement was made by

> the declarant shortly after the incident to which the statement relates with little opportunity to reflect, and is similar to other "firmly rooted hearsay exceptions," i.e., it is a restatement of allegations made earlier that same day to Dr. Boos in a very reliable setting that qualifies under MRE 803(4), and is also a restatement of allegations made the day before to Jennifer Holman in a reliable setting that nearly qualifies under MRE 803(2).
>
> * * *
>
> The accused's 6th Amendment right to confront and cross examine his accuser is not unfairly infringed upon by allowing previous statements of the declarant into evidence, since the defense can subpoena the declarant to explain why she recanted her earlier statements. German law does not permit the declarant to refuse to testify *for* her father. Moreover, the defense has been given the opportunity to introduce the declarant's written recantation in the event that it does not elect to call the declarant in person.

While the military judge's findings describe the circumstances of the making of the videotaped statement in considerable detail, I am not persuaded that they establish the "particularized guarantees" of declarant's trustworthiness necessary for admission of the statement under the residual hearsay exception. It must be noted that the residual hearsay exception is not a "firmly rooted" exception to the hearsay rule. *United States v. Hines,* 23 M.J. 125, 134 (C.M.A. 1986). The residual exception to the hearsay rule is to be rarely used and is intended to apply only to "highly reliable" evidence. *United States v. Giambra,* 33 M.J. 331, 334 (C.M A. 1991), *rev'd on other grounds,* 38 M.J. 240 (C.M.A. 1993); *United States v. Dunlap,* 39 M.J. 835, 838 (A.C.M.R. 1994).

"Particularized guarantees" of trustworthiness means that statements admitted under the residual hearsay exception must have equivalent guarantees of trustworthiness as evidence admitted under a firmly rooted hearsay exception. Mil. R. Evid. 804(b)(5); *Idaho v. Wright, supra* at 821. In other words, it must be so trustworthy that adversarial testing would add little to its reliability. In each case, the circumstances which will qualify as "equivalent guarantees" of trustworthiness are for the trial court to determine and appellate courts to review. *See United States v. Stivers,* 33 M.J. 715, 720 (A.C.M.R. 1991).

The admission of a hearsay statement is much less likely to offend the Sixth Amendment right to confrontation when the declarant is available to testify under cross–examination. *United States v. Harjak,* 33 M.J. 577 *fn.4* (N.M.C.M.R. 1991). When, however, as in this case, the declarant is not available at trial, the accused has not had the opportunity to cross–examine the declarant at any stage of the justice process, counsel for the accused had not even had an opportunity to interview the declarant, and the declarant has recanted the earlier statement, I submit appellate courts have a greater responsibility to scrutinize the particularized guarantees of trustworthiness to eliminate the possibility of fabrication, coaching, or confabulation. *Idaho v. Wright, supra,* at 820.

Examining the military judge's finding, I am not satisfied the circumstances indicated therein provide the same high degree of reliability we assume when a deeply rooted exception to the hearsay rule is recognized. Nor am I satisfied cross examination would have added little to the search for the trustworthiness of declarant's statement. In *Idaho v. Wright,* the court suggested four factors which might properly relate to the reliability of a hearsay statement by a child witness. The four factors were (1) spontaneity and consistent repetition

(2) mental state of the declarant (3) use of terminology unexpected of a child of similar age, and (4) lack of motive to fabricate. *Idaho v. Wright, supra,* at 821. In my view, none of these factors were present in this case.

A videotaped statement made after repeated questioning by Mrs. Holman, Dr. Boos, and the OSI could scarcely be called spontaneous. As was noted in *Idaho v. Wright,* when there is evidence of prior interrogation, prompting, or manipulation by adults, spontaneity may be an inaccurate indicator of trustworthiness. Declarant's trustworthiness could not be judged from the mental state that declarant displayed. The only change in her emotional state occurred when she was relaying how her mother had physically abused her. In her videotaped statement, declarant used no unexpected terminology. If anything, her description of events was somewhat lacking in detail. Finally, I find the military judge's conclusion that declarant "lacked a motive to fabricate at the time" lacks any factual support. In view of declarant's age (in pubescence), unwillingness to confide in her mother, knowledge of her mother's unfaithfulness to her father, frustration over her father's failure to intercede to prevent the mother's physical abuse of the children, and desire not to return to her home because of her mother's physical abuse, any conclusion that she lacked a motive to fabricate at the time must be viewed with some suspicion. None of the factors listed in the findings convince me that cross–examination of declarant would have contributed little to the establishment of her reliability.

Particularly disturbing in the findings by the trial judge were his reliance upon other hearsay exceptions, his suggestion that the defense could have subpoenaed the declarant, and his ruling that the defense would be allowed to introduce declarant's written recantation. First, if admission of declarant's statements to Dr. Boos was error, as I believe it

was, then the fact that the videotaped statement was similar to it scarcely justifies its admission under the residual hearsay exception. Nor does the fact that it was similar to statements made to Jennifer Holman which were not admissible as "excited utterances." Admissibility of evidence under the residual hearsay exception means it hasequivalent guarantees of reliability to other hearsay exceptions, *not that it is similar to other evidence that didn't have sufficient indicia of reliability to warrant admissibility under a "firmly rooted" hearsay exception.*

I am at a loss as to how the defense had a greater opportunity to *subpoena* declarant to appear in a court–martial in Germany than did the government. The findings of the military judge are tantamount to a finding that appellant waived his right of cross–examination. I do not believe that finding is supported by the record. The suggestion that granting appellant permission to admit declarant's written recantation somehow balances the constitutional concerns related to the admission of her videotaped accusation is difficult for me to comprehend.

I am simply not convinced the videotaped interview by the law enforcement officer in this instance possessed sufficient guarantees of trustworthiness to make the statement so reliable as to preclude the necessity for cross–examination. *See United States v. Barror,* 23 M.J. 370, 372 (C.M.A. 1987); *United States v. Palacios,* 32 M.J. 1047 (A.C.M.R. 1991), *rev'd on other grounds,* 37 M.J. 366 (C.M.A. 1993).

Pursuant to my obligation under Article 66(c), I cannot vote to affirm this conviction. To do so, I would be saying that appellant's constitutional right to confront his accuser was superfluous in this case and would not have assisted in any meaningful way in the search for truth. I would be saying that I am satisfied having appellant's conviction rest solely upon hearsay evidence. For the reasons indicated above, I do not

find the hearsay evidence presented at trial to have sufficient reliability to be admitted, and certainly not trustworthy enough alone to convince me beyond a reasonable doubt of appellant's guilt.

There are many cogent reasons why the law has an inherent distrust of hearsay evidence. Mil. R. Evid. 802. Even when admitted under one of the authorized exceptions, we should ask ourselves if the hearsay evidence is sufficiently convincing to be reliable and trustworthy on the issue of guilt. We must look to the facts and circumstances to answer that question. When the hearsay evidence is corroborated by other evidence of guilt, when an accused has entered a plea of guilty or when an opportunity to cross examine the declarant was waived, the inherent distrust of hearsay evidence is attenuated. However, when an accused enters a plea of not guilty, when his accuser recants her story, when the accused has not been given an opportunity to cross examine the declarant, and when there is no evidence of guilt other than the hearsay testimony, we have a situation which cries out for close scrutiny of the reliability of the hearsay evidence. Is the hearsay evidence more convincing because it was heard by more than one person or was repeated on more than one occasion. In my opinion, it is not. The mere fact that something has been repeated does not make it more believable. In our system of justice, a statement becomes most believable when it is made in open court and is subjected to vigorous cross examination. That time honored and constitutionally protected test did not occur in appellant's trial. It is the responsibility of this Court to determine for ourselves whether the reliability of evidence is sufficient to convince us beyond a reasonable doubt of appellant's guilt. Based upon my review of the entire record, I am not convinced his conviction is correct in law and in fact. Article 66(c) UCMJ.

OFFICIAL

ALVIN J. STRIBLING
Technical Sergeant, USAF
Chief Court Administrator